U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES B. ASHLEY, JR. and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Daytona Beach, FL

Docket No. 98-1525; Submitted on the Record;
Issued January 10, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant sustained an injury in the performance of duty.

On October 25, 1996 appellant, then a 46-year-old letter carrier, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that he sustained an injury to his back while lifting tubs of flats on October 11, 1996. He described the nature of his injury as pain in his back radiating to his hips and legs. Appellant ceased work on October 12, 1996. In support of his claim, appellant submitted an October 25, 1996 duty status report (Form CA-17) from Dr. Edward J. Milcarsky, a Board-certified family practitioner. He reported a diagnosis of sciatica and imposed physical restrictions of lifting no more than 10 pounds.[1]

On November 18, 1996 the Office of Workers' Compensation Programs advised appellant that the information submitted with his claim was insufficient to establish that he sustained an injury on October 11, 1996. The Office requested that appellant submit medical documentation for any treatment he received regarding his alleged injury. Appellant was advised that he had 30 days within which to submit such evidence.

In response to the Office's request, appellant submitted emergency room records for treatment he received on October 12, 1996. Appellant was seen in the emergency room by Dr. Gonzalo Gonzalez, who reported the following history: "[low back pain] on and off ~ several days, worse [with] lifting 'mail tubs' at work." He also noted that appellant complained of pain in his right lower leg and that he was seen approximately three weeks ago for leg pain. Additionally, Dr. Gonzalez noted that appellant's x-ray revealed degenerative disc disease of the lumbar spine. However, Dr. James W. Weaver interpreted appellant's October 12, 1996 x-rays of the lumbar spine, pelvis and right tibia and fibula as revealing "no acute abnormalities." Appellant also submitted treatment notes from Dr. Milcarsky covering the period of October 15 through December 16, 1996. Dr. Milcarsky initially treated appellant on October 15, 1996 and

[1] The Form CA-17 did not include a date of injury or a description of how the injury occurred.

noted a history of right lower leg pain and lower back pain "which started Friday [October 11, 1996]." His initial assessment was "lower back pain x 5 days" and "independent edema of [right] lower leg." Dr. Milcarsky October 24, 1996 treatment notes indicate that "2 weeks ago [appellant] lifted some boxes [and] felt some back pain" and the "next day [the] pain radiated to both hips [and] legs." He also completed another Form CA-17 dated December 16, 1996 which noted a diagnosis of sciatica.

By decision dated January 10, 1997, the Office denied appellant's claim on the basis that the evidence of record failed to establish that an injury was sustained as alleged. The Office explained that the evidence of record supported the fact that the claimed event, incident or exposure occurred at the time, place and in the manner alleged. However, the medical evidence of record did not support a medical condition resulting from the accepted trauma or factors. The Office particularly emphasized the different histories reported by Drs. Gonzalez and Milcarsky and the fact that neither physician specifically attributed appellant's condition to the lifting incident on October 11, 1996.

On January 29, 1997 appellant requested reconsideration. In support of his request, appellant submitted, among other items, a triage nursing assessment sheet that was completed in the emergency room on October 12, 1996. The triage nurse reported that appellant "stated [he] developed pain in low back yesterday while bending [and] lifting boxes of mail" and that today the "pain is going down sides of both legs." Appellant also submitted a January 7, 1997 report from Dr. Charles B. Williamson, a Board-certified orthopedic surgeon. The doctor diagnosed lumbar strain and reported a history of injury on October 11, 1996 while lifting a tub of mail from the floor. Dr. Williamson also noted that appellant had a similar injury to his back about seven years ago which abated after about two months. The doctor also reviewed appellant's October 12, 1996 x-rays of the lumbar spine and noted anterior osteophytic lipping at L5 and some inferior osteophytic lipping at L4, but otherwise no significant changes. In a letter dated January 31, 1997, Dr. Williamson indicated that appellant's reported mechanism of injury was entirely consistent with his complaints. The doctor explained that lifting objects can aggravate arthritis, aggravate prior back problems or can cause problems in the back *de novo*. Dr. Williamson further stated that "it is obvious that [appellant's] mechanism of injury can cause a strain whether or not he is using proper body mechanics."

In a merit decision dated March 17, 1997, the Office denied modification. The Office explained that the late filing of the claim and the presence of certain inconsistencies in the record coupled with the fact that appellant reportedly experienced pain several days prior to the employment incident on October 11, 1996, cast serious doubt on the validity of the claim. The Office also noted that appellant had filed two previous claims for back injuries.

Appellant filed a second request for reconsideration on April 9, 1997. He also submitted a January 7, 1997 report from Dr. Williamson indicating a diagnosis of lumbosacral sprain and strain and noting a date of injury of October 11, 1996. Additionally, appellant submitted a statement dated January 21, 1997 in which he indicated, among other things, that he advised the employing establishment of his injury on October 11, 1996, several weeks prior to filing his claim. The Office denied appellant's request by decision dated May 5, 1997. The Office

explained that the record lacked a medical report that contained a complete history of the injury as well as a history of appellant's prior back problems.

On June 10, 1997 appellant filed a third request for reconsideration. In support of his request, appellant submitted a statement dated May 22, 1997 in which he reiterated his prior assertion that he advised his supervisor of his injury on October 11, 1996. Additionally appellant submitted a May 15, 1997 report from Dr. Williamson. The doctor indicated that appellant sustained trauma to his back while lifting tubs of mail and that he has had pain in his back with radiation down the leg. Additionally, Dr. Williamson noted a diagnosis of herniated nucleus pulposus at L4-5 and L5-S1. The doctor also stated that while it was possible that appellant's prior back injury may have had some relation to his current injury, it was more likely that this 10-year-old injury had minimal, if any, contribution to the current condition. Dr. Williamson reasoned that appellant's current condition was causally related to the 1996 back injury because prior to that injury appellant had been working without back problems for ten years. Appellant also submitted a May 19, 1997 report from Dr. Thomas R. Boulter, a Board-certified neurosurgeon. The doctor indicated that he examined appellant on May 15, 1997 and that he reported a history of injury on October 11, 1996 "when [appellant] was picking up a load at work as a postal employee." Dr. Boulter also noted that a March 29, 1997 magnetic resonance imaging scan revealed degenerative disc disease at both L4 and L5 with mild herniations at both levels.

The Office forwarded appellant's May 22, 1997 statement to the employing establishment for comment. In response, the Office received a statement from appellant's supervisor, Mr. David J. Jacobson, in which he indicated that appellant had not advised him on October 11, 1996 of an on-the-job injury as alleged. Mr. Jacobson explained that a Mr. Hall advised him on October 25, 1996 that appellant had an on-the-job injury. Mr. Bryant Oxendine, another supervisor who spoke with appellant on October 12, 1996, also provided a statement. Mr. Oxendine stated that when appellant called in sick that day, he did not mention that he had hurt his back on the job, but merely that he would not be in that day due to back pain. Mr. Oxendine further explained that appellant first advised him of an on-the-job injury approximately two to six days after their initial conversation on October 12, 1996.

Upon reviewing the statements of Mr. Jacobson and Mr. Oxendine, appellant submitted another statement dated July 28, 1997 in which he refuted the version of events provided by both individuals. Appellant explained that Mr. Dennis Bonilla witnessed his conversation with Mr. Jacobson on October 11, 1996 when he reported his back injury. Additionally, appellant stated that while he may not have specifically mentioned that his back injury was work related during his telephone conversation with Mr. Oxendine on the morning of October 12, 1996, he certainly made this fact clear to Mr. Oxendine when he approached him later that day to obtain the necessary forms so that he could seek medical treatment for his back injury.

By merit decision dated August 25, 1997, the Office again denied modification due to inconsistencies in the factual and medical evidence submitted.

Appellant filed a fourth request for reconsideration on December 18, 1997. He also submitted additional medical evidence, which included treatment notes dated August 8, 1989 for a strained left foot. Appellant also submitted treatment notes dated October 19, 1987 for

lumbosacral sprain. Additionally, appellant submitted a September 19, 1996 report from Dr. William H. Meek concerning a September 17, 1996 emergency room visit for treatment of appellant's right ankle. Dr. Meek advised appellant that the staff radiologist had determined that appellant had "a possible boney (sic) abnormality" in his right foot. Appellant also provided a November 26, 1997 statement from Dennis Bonilla, who indicated that he witnessed the October 11, 1996 conversation between appellant and Mr. Jacobson during which appellant advised Mr. Jacobson of his work-related back injury. Mr. Ross Shotwell also provided a statement indicating that appellant came to work on October 12, 1996 to obtain the necessary forms to seek medical treatment for his back injury. Finally, appellant submitted his own statement dated December 15, 1997, in which he pointed out certain inconsistencies in the statement provided by Mr. Oxendine. Appellant also commented on the discrepancy in the histories reported by Dr. Gonzalez and the emergency room triage nurse on October 12, 1996.

The Office subsequently referred the statements from appellant, Mr. Bonilla and Mr. Shotwell to the employing establishment for comment. In response, Mr. Oxendine reiterated that appellant did not mention that his injury was job related during their October 12, 1996 telephone conversation. Furthermore, Mr. Oxendine acknowledged that appellant came to him on October 12, 1996 in order to obtain certain forms, however, he stated that appellant did not advise him that his injury was work related. Mr. Oxendine assumed that appellant had injured himself while working in his construction business. Mr. Jacobson also prepared a statement dated January 28, 1998, in which he again denied having been advised by appellant on October 11, 1996 that he sustained a work-related back injury. With respect to Mr. Bonilla's statement that he was present during the October 11, 1996 conversation between Mr. Jacobson and appellant, Mr. Jacobson indicated that he did not remember Mr. Bonilla being present on the workroom floor. The Office forwarded both statements to appellant on January 28, 1998 and advised him that he had 15 days to respond if he so desired.

The Office denied appellant's most recent request for reconsideration in a merit decision dated February 13, 1998. The Office explained that the statements provided by Mr. Shotwell and Mr. Bonilla were prepared more than a year after the incidents described therein and as such, they were not sufficiently compelling to overrule the statements provided by the employing establishment. With respect to the medical evidence, the Office explained that the record still lacked a rationalized medical opinion attributing appellant's condition to his federal employment. Appellant subsequently filed an appeal with the Board on April 3, 1998.[2]

The Board finds that appellant has failed to establish that he sustained an injury in the performance of duty.

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components that must be considered in

[2] The record on appeal includes evidence that was not submitted to the Office prior to the issuance of its February 13, 1998 decision. This evidence is date stamped as being received in the Office on February 18, 1998. Inasmuch as the Board's review is limited to the evidence of record that was before the Office at the time of its final decision, the Board cannot consider appellant's newly submitted evidence. 20 C.F.R. § 501.2(c).

conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred.[3] As previously noted, the Office in its January 10, 1997, decision found that the evidence of record supported the fact that the claimed event, incident or exposure occurred at the time and place and in the manner alleged.

The second component in a fact of injury analysis is whether the employment incident caused a personal injury. This latter component generally can be established only by medical evidence. To establish a causal relationship between the claimed condition, as well as any attendant disability and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.[4] An award of compensation may not be based upon surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish a causal relationship.[5] In the instant case, the medical evidence submitted by appellant has repeatedly been deemed insufficient to satisfy this second component.

Although appellant has submitted medical evidence which attributes his current back condition to the October 11, 1996 employment incident, the initial evidence of record that was obtained shortly after the incident noted that appellant's back pain predated the October 11, 1996 employment incident by several days. Dr. Gonzalez's October 12, 1996 emergency room report clearly indicates that appellant reported a history of lower back pain for several days prior to his treatment in the emergency room that day. The doctor also reported that this preexisting pain became "worse [with] lifting 'mail tubs' at work." While the October 12, 1996 report prepared by the emergency room triage nurse does not include a history of preexisting back pain, this fact alone does not establish that Dr. Gonzalez inaccurately reported the history provided him by appellant.[6] Moreover, appellant has a prior history of back injury as well as evidence of degenerative disc disease as noted by Drs. Gonzalez, Williamson and Boulter.

The various medical reports prepared by Drs. Williamson, Milcarsky and Boulter tend to support a finding of causal relationship between appellant's current condition and the employment incident of October 11, 1996. However, none of their respective reports include a detailed history of injury or an acknowledgement of appellant's reported complaints of back pain a few days prior to the incident of October 11, 1996. Furthermore, this evidence does not include a rationalized explanation of how the October 11, 1996 employment incident either caused or aggravated appellant's back condition.[7] Dr. Williamson, in his report dated May 15,

[3] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[5] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[6] As previously noted, the triage nurse reported that appellant "stated [he] developed pain in low back yesterday while bending [and] lifting boxes of mail" and that today the "pain is going down sides of both legs."

[7] *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (the Board found that a medical opinion not fortified by medical rationale is of little probative value).

1997, merely surmised that since appellant was able to work pain free for approximately 10 years, his prior back injury contributed minimally, if at all, to his current condition. Not only is the doctor's opinion speculative, but it is somewhat undermined by Dr. Gonzalez' report that appellant experienced back pain in the days prior to the incident of October 11, 1996. In an earlier report dated January 31, 1997, Dr. Williamson stated that "it is obvious that [appellant's] mechanism of injury can cause a strain…." While the causal relationship between appellant's current back condition and the lifting incident of October 11, 1996 may be obvious to Dr. Williamson, the doctor nonetheless failed to clearly articulate how appellant's current condition was either caused or aggravated by his employment. In the absence of rationalized medical opinion evidence establishing a causal relationship between appellant's current condition and the employment incident of October 11, 1996, the Office properly denied appellant's claim for compensation.

The decision of the Office of Workers' Compensation Programs dated February 13, 1998 is, hereby, affirmed.

Dated, Washington, D.C.
January 10, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member